

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In reply refer to:
1800B3-BCD

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Re: WIIZ(FM), Battle Ground, IN
File No. BALH-940516GI
Application for Assignment of Station License

Dear Counsel:

We have on file the above-captioned application to assign station WIIZ(FM), Battle Ground, Indiana, from Wizard Broadcasting, Inc. ("Wizard") to Schurz Communications, Inc. ("Schurz").¹ Also on file are University Broadcasting Company, L.P. ("University") and KGB Broadcasting's ("KGB") (collectively, "Petitioners") timely filed Joint Petition to Deny and various opposition and reply pleadings.² Also on file is a July 26, 1994 letter filed by Bruce

¹ WIIZ(FM) is a Class A station authorized to operate on Channel 254 with 4.4 kW effective radiated power ("ERP") at 119 meters height above average terrain. Since June 3, 1994, WIIZ(FM) has remained silent pursuant to special temporary authority.

² University and KGB are licensees of radio stations licensed to the same communities or serving the same market as WIIZ(FM) and thus have standing to file their Joint Petition to Deny. See FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

A. Patrick ("Patrick") objecting to the application.³ As set forth below, we deny both Petitioners' Joint Petition to Deny and Patrick's objection, and grant the subject application.

Background. Schurz reports that its wholly-owned subsidiary, WASK, Inc., is the licensee of WKOA(FM) (previously WASK-FM) and WASK(AM). Because these stations have principal community contours which overlap with the proposed acquisition, WIIZ(FM), Schurz provides a list of the 11 other commercial radio stations that have principal community contours which overlap with the three subject stations.⁴ Accordingly, Schurz concludes that the subject stations are located in a market with 14 or fewer stations, and asserts that its ownership of a third station in the market conforms with 47 C.F.R. § 73.3555(a)(1).⁵

Petitioners allege that the proposed assignment is prima facie inconsistent with 47 C.F.R. § 73.3555. Specifically, Petitioners contend that Schurz fails to include two additional stations, WBAA-FM, Lafayette, IN, and WMRS(FM), Monticello, IN, whose principal community contours overlap with the subject stations. Petitioners contend that even though WBAA-FM is a noncommercial station, it should be included in the relevant market because it operates on an unreserved frequency and can be converted into a commercial station or sold to a commercial entity at any time. As for WMRS(FM), Petitioners assert that it should be included in the relevant market because, based on field strength tests of the actual 70 dBu contours, as well as the predicted contours, WMRS(FM) and WKOA(FM)'s contours are subject to overlap. Petitioners further allege that if WKOA(FM) were to increase the height of its tower to the maximum height permitted for a Class B facility, the relevant market would increase to "at least" 18 stations.

Petitioners argue that the inclusion of WBAA-FM and WMRS(FM) creates a market of 15 or more stations. Based upon the relevant audience share from the 1993 Fall Arbitron

³ Pursuant to 47 C.F.R. § 73.3587, we will treat Patrick's letter as an informal objection to the instant application.

⁴ The 11 stations are: WCFY(AM), Lafayette, IN; WKHY(FM), Lafayette, IN; WAZY(FM), Lafayette, IN; WGLM(FM), West Lafayette, IN; WBAA(AM), West Lafayette, IN; WILO(AM), Frankfort, IN; WSHW(FM), Frankfort, IN; WNJY(FM), Delphi, IN; WGBD(FM), Attica, IN (previously WBQR(FM)); WEZV(FM), Brookston, IN and WIMC(FM), Crawfordsville, IN.

⁵ Section 73.3555(a)(1) states in pertinent part that:

[i]n radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations...represent less than 50 percent of the stations in the market. 47 C.F.R. § 73.3555.

Market report, Petitioners allege that the proposed combination's audience share would total 32.4 percent. Petitioners argue that the subject application therefore violates 47 C.F.R. § 73.3555.⁶

Patrick contends that grant of the subject application would allow Schurz to "monopolize the Lafayette radio market." Specifically, Patrick alleges that, according to Arbitron data published in a local newspaper, WASK(AM), WKOA(FM) and WIIZ(FM)'s combined audience shares total 32.4%. Given this audience share, Patrick states that a grant of the subject assignment would not be in the public interest, or in the interest of the Lafayette radio market.

Schurz responds that Petitioners are incorrect with respect to WBAA-FM, WMRS(FM) and WKOA(FM).⁷ Schurz argues that WBAA-FM should not be included when calculating the relevant market because it is licensed as a noncommercial educational station, and that the "Commission's intent to exclude such stations is unmistakable." With respect to WMRS(FM), Schurz asserts that Petitioners' use of actual field strength measurements is "unavailing." Schurz argues that Section 73.3555(a) "unambiguously" calls for the use of predicted rather than actual community contours when calculating the number of FM stations in a market. Schurz maintains that WMRS(FM)'s principal community contour, when predicted in accordance with 47 C.F.R. § 73.313, "while coming close," does not overlap with that of WKOA(FM).⁸ Regarding Petitioners' allegation that WKOA(FM)'s potential for increased facilities creates a larger market than stated in the instant application, Schurz contends that the Commission has never indicated that stations operating at less than full tower height permitted for a respective station class should be treated any differently for the purposes of the multiple ownership rules.

Petitioners reply that WBAA-FM and WBAA(AM) should be included in the relevant

⁶ Section 73.3555(a)(1) states in pertinent part that:

[i]n radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial radio stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered prima facie inconsistent with the public interest. 47 C.F.R. § 73.3555.

⁷ Schurz's opposition also amends its original calculation of the relevant market to include a total of 10, rather than 11, stations in addition to the subject stations. Schurz explains that it had "inadvertently" included WBAA(AM), a non-commercial educational station.

⁸ Section 73.3555(a)(3)(i) defines the principal community contour for FM stations as "the predicted 3.16 mV/m contour computed in accordance with § 73.313." Section 73.313 sets forth a method for predictions of coverage on the basis of estimated field strengths utilizing the F(50,50) field strength chart.

market because they both operate on unreserved channels and, as such, might convert to commercial operations at any time.⁹ Petitioners further argue that the plain language of Section 73.3555 does not limit the relevant market to "commercially-operated" radio stations, but instead includes all stations in the commercial band, whether or not they operate commercially. In response to Schurz's contention that WMRS(FM) and WKOA(FM)'s predicted principal community contours are merely proximate but not overlapping, Petitioners assert that Schurz bases its predictions upon outdated data. Specifically, Petitioners contend that Schurz's engineer has predicted WMRS(FM)'s contour based upon an ERP of 2.5 kW rather than its authorized 4.4 kW ERP.¹⁰ Petitioners further assert that WMRS(FM) and WKOA(FM)'s contours overlap when predicted utilizing an NBS Technical Note 101 ("Tech Note 101") study. Petitioners contend that the Tech Note 101 study also reveals that WKOA(FM)'s contour overlaps with four additional stations not previously listed, thus creating a market of 19 stations.¹¹ Additionally, Petitioners maintain that the use of field strength measurements is appropriate because "stations whose contours actually overlap raise the same concerns regarding market concentration as stations whose predicted contours overlap."

Schurz subsequently filed a Motion to Strike asserting that Petitioners' use of Tech Note 101 is procedurally and substantively improper. Procedurally, Schurz argues that Tech Note 101 constitutes prohibited new matter introduced for the first time in the Petitioners' reply. Substantively, Schurz argues that Petitioners have not made the required showing that would allow the supplemental use of Tech Note 101.¹² Petitioners respond that Tech Note 101 does not constitute new matter. They argue that Tech Note 101 merely augments their original assertion that WKOA(FM) and WMRS(FM)'s predicted community contours overlap.

Discussion. Petitioners' contention that the relevant market contains more than 15 stations is without merit. Although located within the commercial band, WBAA(AM) and WBAA-FM, owned by Purdue University, are licensed as noncommercial educational stations.¹³ The Commission has clearly indicated that noncommercial stations are excluded

⁹ Petitioners claim that Schurz has erroneously dropped WBAA(AM) from its list of stations in the relevant market.

¹⁰ WMRS(FM) is licensed to operate at 4.4 kW ERP. See File No. BMLH-900503KF.

¹¹ These stations are WWKI(FM), Kokomo, IN; WIBN(FM), Earl Park, IN; WCLV(FM), Cleveland, OH and WIBC(AM), Indianapolis, IN.

¹² Schurz cites to 47 C.F.R. § 73.313(e). That subsection permits supplemental showings, in addition to the standard prediction method, in instances "where the terrain in one or more directions from the antenna site departs widely from the average elevation." 47 C.F.R. § 73.313(e).

¹³ See File Nos. BR-890403VG (WBAA(AM)) and BLED-930210KB (WBAA-FM).

from the relevant market: "[t]he number of stations in a radio market, is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question." 47 C.F.R. § 73.3555(a)(3)(ii) (emphasis added); see also Revision of Radio Rules, Memorandum Opinion and Order/First Recon. Order ("MO&O"), 7 FCC Rcd 6387 at 6395 (1992) (relevant market excludes noncommercial stations since they do not compete for commercial advertising, and are generally not included in reported ratings surveys). Petitioners' argument that WBAA(AM) and WBAA-FM could switch "at anytime" to commercial service is unavailing, as such action would require prior Commission approval. Equally unavailing is Petitioners' assertion that the relevant market should include additional stations because WKOA(FM) could potentially increase its tower height to the maximum height for a Class B facility. For the purposes of determining compliance with our multiple ownership rules, we decline to speculate on whether a licensee might, in the future, request modifications that would result in noncompliance with our Rules.

We also find that Petitioners' contention that the relevant market consists of 19 stations, when WKOA(FM)'s contour is predicted using Tech Note 101, to be without merit.¹⁴ In a multiple ownership context, where an application conforms with our rules utilizing the standard prediction method set forth in 47 C.F.R. § 73.313, we will not accept alternative prediction methods. Requiring applicants with conforming applications to defend those applications against alternative prediction methodologies would result in unreasonable delay to the applicants and unnecessary administrative burden upon the limited technological resources available to the Commission for evaluating alternative prediction studies. Using the standard prediction method mandated by 47 C.F.R. § 73.313, we conclude that Schurz's application conforms to the requirements of 47 C.F.R. § 73.3555. Therefore, we decline to add the four additional stations identified by Petitioners based upon an alternative prediction method.¹⁵

For the foregoing reasons, we find that the relevant market, including WMRS(FM),¹⁶

¹⁴ Petitioners' use of Tech Note 101 to argue that the market consists of 19 stations constitutes new matter raised for the first time in its reply. The Commission's Rules strictly limit reply pleadings to matters previously raised in the opposition. See 47 C.F.R. § 1.45(b). Nevertheless, in this instance, we find it to be in the public interest to consider the Tech Note 101 allegations. See Newhouse Broadcasting Corp., 61 F.C.C.2d 528 (1976). Accordingly, we deny Schurz's Motion to Strike, but accept its response contained therein.

¹⁵ See note 10, supra.

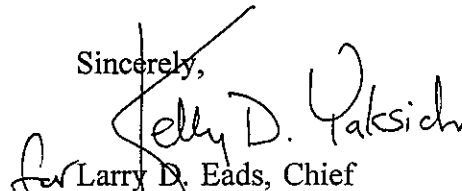
¹⁶ Although Petitioners argue that Schurz has failed to predict WMRS(FM)'s contour using the correct ERP, we note that WMRS(FM) has recently been granted a major change modification to relocate its transmitter, increase tower height to 157 meters HAAT and decrease power to 2.5 ERP (File No. BPH-941028IF). Accordingly, Eads Broadcasting Corp., 9 FCC Rcd 2859 (1994) requires an evaluation of both the presently authorized facility and

(continued...)

contains 14 stations.¹⁷ Schurz proposes to own three stations, no more than two same-service, in a market where the subject stations would comprise less than fifty percent of the stations in the market.¹⁸ Therefore, Schurz's acquisition of WIIZ(FM) conforms with 47 C.F.R. § 73.3555.

Conclusion. University Broadcasting Company, L.P. and KGB Broadcasting's Joint Petition to Deny IS DENIED. Bruce A. Patrick's informal objection IS DENIED. The application to assign station WIIZ(FM), Battle Ground, Indiana, from Wizard Broadcasting, Inc. to Schurz Communications, Inc. (File No. BALH-940516GI) IS GRANTED.

Sincerely,


 Larry D. Eads, Chief
 Audio Services Division
 Mass Media Bureau

cc. Richard S. Rodin, Esq.
 Mr. Bruce A. Patrick

¹⁶(...continued)

the relevant proposed or authorized modified facility. We find that the facilities authorized in File No. BPH-941028IF place a predicted contour overlap with the subject relevant market. We thus include WMRS(FM) within the relevant market.

¹⁷ The 14 stations are: WIIZ(FM), Battle Ground, IN; WKOA(FM), Lafayette, IN; WASK(AM), Lafayette, IN; WMRS(FM), Monticello, IN; WCFY(AM), Lafayette, IN; WKHY(FM), Lafayette, IN; WAZY(FM), Lafayette, IN; WGLM(FM), West Lafayette, IN; WILO(AM), Frankfort, IN; WSHW(FM), Frankfort, IN; WNJY(FM), Delphi, IN; WGBD(FM), Attica, IN (previously WBQR(FM)); WEZV(FM), Brookston, IN and WIMC(FM), Crawfordsville, IN.

¹⁸ As noted above, the relevant market is not Lafayette, Indiana, but the area formed by the overlapping contours of the stations in the proposed combination. See 47 C.F.R. § 73.3555(a)(3)(ii). Patrick's objection to the alleged concentration in Lafayette is therefore without merit.